

CHRISTIAN, DILLON, EDWARDS et al.

V.

NORTHWEST GENERAL HOSPITAL

92-00110

DECISION OF JEFFRY A. HOUSE

Board of Inquiry

Re: Ruling on Motion to Add a Party

Christian, Dillon, Edwards et al.

Complainants

V.

Northwest General Hospital

Respondents

Re: Ruling on Motion to Add a Party

May 15, 1993

By letter dated December 18, 1992, I was appointed a Board of Inquiry in the matter of complaints by a number of persons that they were discriminated against in employment by reason of race, colour, harassment, ethnic origin, place of origin and reprisal by Northwest General Hospital and ten other Respondents.

On December 22, 1992, a motion was filed by the Ontario Nurses Association, seeking an order that they be added as a party to the hearing, or in the alternative, that they be added as amicus curiae, to assist the Board with evidence and argument.

The motion was argued on February 26th, 1993. The position of the Ontario Nurses Association [O.N.A.] was supported by Mr. Hart, counsel for the Ontario Human Rights Commission, and by Ms. Wilkie, who represented the complainants.

The factual basis for the motion was provided in an affidavit of Maureen Anne O'Hallaran, Assistant Director, Arbitration and Research Services, of O.N.A..

The affidavit, which was, in great measure, uncontested by the parties, establishes that O.N.A. is bargaining agent for approximately 52,000 registered and graduate nurses in Ontario, representing approximately 444 bargaining units. Since 1980, O.N.A. and number of participating hospitals became parties to a Central Collective Agreement, governing a large number of nurses in Ontario. Northwest General Hospital is presently a member of the group of hospitals covered by the Central Collective Agreement, and continues to participate in group bargaining for the next Central Collective Agreements, which become effective April 1, 1993. There also exists a "local appendix", which is an agreement between O.N.A. and Northwest General Hospital alone, and which appears, on cursory examination, to address

matters absent from the Central Collective Agreement, and reflecting local conditions. O.N.A. represents numerous persons of colour, and, it is indicated in the affidavit, is "following up on complaints of systemic racial discrimination in at least one other hospital".

It is alleged in paragraph 19 of Ms. O'Hallaran's Affidavit that "O.N.A., as bargaining agent for the named complainants and for other nurses at Northwest General Hospital, and as bargaining agent for other nurses employed at the other participating hospitals who are governed by the same Central Collective Agreements as the nurses at Northwestern, including the complainants, has a direct interest in the subject matter before this Board". It is further alleged that any appropriate systemic remedy granted will have a direct effect on O.N.A. in its capacity as bargaining agent, and in its duty of fair representation of all its members, throughout Ontario and at Northwestern General Hospital in particular.

Ms. Ashman, on behalf of O.N.A., indicated that O.N.A. wishes to support the position of the complainants that they have been discriminated against, and wishes to be added as a party in order to adduce evidence, cross-examine witnesses, and make oral and written submissions with respect to the case.

Ms. Ashman submitted that I have the authority to make such an order. She urged that this power is to be found in S.39(1)(c) of the Human Rights Code, and in S.23(1) of the Statutory Powers Procedure Act.

S.39(1)(c) of the Human Rights Code reads as follows:

"The Board of Inquiry shall hold a hearing, c) to decide upon a appropriate order under section 41."

Ms. Ashman argued that since "an appropriate order" in this case might well involve considerations of remuneration and seniority which would alter the stated terms of the collective bargaining agreement, the power to make "an appropriate order" necessarily implies the power to add appropriate parties. This power, she said, is clarified and defined by S.23(1) of the Statutory Powers Procedure Act, which allows me to "make such orders or give such directions" as may be proper to prevent abuse of process.

Ms. Ashman submitted, further, that O.N.A. is owed a duty of fairness by the Board, in that a remedy granted to the particular complainants here, which presumably, affecting them favourably, would negatively affect other members of the same bargaining unit, quite apart from its effect on the collective bargaining process itself. Further, she argued, S.69 of the Labour Relations Act imposes a duty of fair representation upon the union. She indicated that O.N.A. sought status as a party before the Board in order to be bound by its findings, and in order to have a ready answer should it ever be accused of unfair representation by members of the

bargaining unit whose seniority, for example, would be given less effect due to a potential holding of this Board of Inquiry.

Finally, it was argued that the participation of the union as a party would ensure a fairer result. It was submitted that the union is necessarily far more knowledgeable about employment practices in hospitals than is the Human Rights Commission, and would be in a position to provide witnesses to rebut any unfounded contentions urged by the Respondents.

The Position of the Human Rights Commission and the Complainants

Mr. Hart, for the Commission supported the application for status as a party by O.N.A.. He confirmed that the Commission is seeking a "broad and systemic remedy". He further stated that, in his view, the union is "a key player" in the institutional framework under examination. He submitted, furthermore, that the interests of the Commission and O.N.A. are not the same, and that there might be instances in which the Commission would be unwilling to call evidence or take a position which the union might wish to take.

Ms. Wilkie, for the Respondents, also supported the application. She stated that the complainants' interest is in an effective remedy if they are successful at this inquiry. She indicated that her clients wish O.N.A. to be bound by any order this Board might make, and that full party status would be necessary to achieve that result. She further argued that there is a significant difference between her clients' interest and that of O.N.A., which, she said has an ongoing interest in preserving the collective bargaining regime, while her clients have no such interest.

The Position of the Respondents

The Respondents submitted that since a Board of Inquiry is a creature of statute, its power to add parties must be found in statute. Here, it was submitted, that statute sets out, in S.39(2) and 39(3) who may be added as parties, and since O.N.A. cannot bring itself within the statute, its application must fail. Ms. Baker, for the Respondents, denied that there exists any general, inherent, or overriding jurisdiction to add parties. She submitted that, similarly, no power to grant *amicus curiae* status exists, and that those Board of Inquiry cases in which status has been granted often show either that no party objected, or that the source of that authority was derived from case law which was not strictly applicable.

Analysis

- 1) Does the Board have the power to add parties (or *amicus curiae*) which are not envisaged by S.39(2) of the Human Rights Act?

In my view, S.5 of the Statutory Powers Procedure Act and S.23(1) of that Act do give a Board the power, in a proper case, to add a party whose interests would be directly affected by a hearing under the Human Rights Code. S.39(2) of the Human Rights Code specifies who is to be a party as of right, and does not foreclose the possibility that, where fairness or natural justice requires it, an additional party could be named by the Board.

Horace Krever, as he then was, made that explicit in Simms v. Ford Canada (Unreported Board of Inquiry Ruling June 4, 1970) at page 3 where he said, with respect to the parties named in the predecessor section to S.39(2):

"This conclusion, however, means only that no one other than these three parties [i.e. the specified parties] may participate in the proceedings as of right. It does not, in my respectful opinion, preclude the Board from exercising a discretion, in appropriate cases, to permit others to be involved".

While it was argued that the case of MacCosham Van Lines (Canada) v. Ontario Minister of Transportation and Communications (1988) 66 O.R. (2nd) 198 has, in effect overruled Simms by implication, I do not believe that to be the case. In MacCosham, the holder of a licence as a mover under the Public Commercial Vehicles Act obtained a licence which allowed for carriage of goods throughout Durham Region. Due to the changes in the regulations, he applied for a "rewritten certificate". The legislation established that, with respect to rewritten certificates only, the sole parties to a hearing would be the Minister and the Applicant. Other moving companies objected to the fact that the "rewritten certificate" expanded the ability of the licence holder to do business throughout Ontario, and that this increased competition affected them adversely. They applied to the Divisional Court to have the decision of the Ontario Highway Transit Board struck down.

The Court held that, in the circumstances, the appealing moving van companies had no right to party status. The Court held that, in the circumstances of the case there was no basis on which to add a party not directly specified in the legislation.

In my view, the case is not directly relevant to the situation before me. First, the legislation in MacCosham stated that: "Only the applicant and the Minister are parties to a hearing under subsection 3". The underlined word "only" is, in my view, of particular significance in clarifying the intention of the legislature. Equally relevant is the fact that the Court held any apparent increase in the certificate-holders' rights was "dictated by S.4 of the O.Reg.172/86 and the Board had no choice in the matter" (at p.208.) Therefore, the Court held that the limitation of parties on the re-application was reasonable "given that the Board had no discretion to exercise". The presence of other persons "would be hard to justify since they could say or do nothing of substance that could influence the Board in the performance of its duty". (at p.211).

The Court then goes on to consider the principle that "where natural justice requires it, notice and an opportunity to respond must be given to persons who might be prejudiced by acts done under legislative authority, notwithstanding that the legislation does not require it". Given that the Court found that the Board had no discretion to exercise, it is not surprising that it found no omission by the legislature in failing to provide for notice and a right to be heard.

In my view, the Courts have, at least by implication, indicated that the doctrine set out in Simms, *supra*, remains the law in Ontario. In Huynh v. Jones, (1991), 2 O.R.(3rd) 562 a three member panel of the Divisional Court refused to treat a list of powers and duties set out in S.27 of the Coroners Act as being exhaustive. Rather, the Court held, such listed powers "do not by implication exclude the power, necessarily incidental to the Coroner's Act. The doctrine expressio unius rule of construction should not be applied if it will lead to injustice, particularly when dealing with the holder of a public office engaged in important public duties: Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police (1979) 1 S.C.R. 311, 23 N.R. 410 per Laskin, C.J.C. at pp.321-22 S.C.R."

Huynh was specifically considered by the Divisional Court in BACD v. Hunter, (1993) 11 O.R. (3rd) 641 at p.684, with respect to the issue of whether a coroner has a residual discretion to name parties, apart from those set out in the statute. While the Court ultimately found it unnecessary to decide the issue, it made the following relevant remarks:

"Legislatures cannot always anticipate by explicit mandate every conceivable power an agency may require. Accordingly, there may be occasions where a power may be reasonably inferred as necessarily incidental to more general powers specifically conferred. Experience also suggests that the presence or absence of implied powers is best left for initial decision by the Tribunal having direct responsibility for the administration of the statute".

I do not, then, believe that the Courts have foreclosed the Simms approach, as argued by the Respondents. Similarly, I believe that it remains open to me to grant *amicus curiae* status in a proper case, if fairness or the objects of the Human Rights Code require it.

2) When Should the Power to Add Parties Be Exercised?

I was referred to numerous cases which, it was argued, may apply to the situation before me. Many of the cases which counsel supplied were decisions by superior courts exercising the jurisdiction set out in a Rule of Practice, such as Rule 13.01 of the Ontario Rules of Civil Practice. Examples of cases decided under that rule or a similar rule are Re the Ontario Energy Board Act (1985) 2 C.P.C. (2d), 226 (Div. Ct.);

American Airlines Inc. v. Competition Tribunal et al. (1988) 33 Admin. L.R. 229 (Iacobucci, C.J., F.C.A.); Re Starr and Twp. of Puslinch (1976) 12 O.R. (2d) 40; and Great Atlantic and Pacific Co. of Canada Ltd. et al. (1990) 74 O.R. (2d) 164.

Since my power to add a party flows from S.23 of the Statutory Powers Procedure Act and the general duty of fairness owed to a person whose interests may be adversely affected, it is my view that my power to add parties is more limited than the power which a superior court may exercise under the Rules. Therefore, I believe that the cases mentioned (supra) cannot be applied to the situation before me without modification to reflect that more limited power.

In my view, O.N.A. does not have a direct interest in the subject matter in the case before me. I am to determine whether the Respondents have infringed the rights of ten persons to freedom from discrimination in the workplace. These ten persons are directly interested in the matter, and they are, of course, parties. O.N.A. is their legal representative for collective bargaining, but would not be directly affected either by a finding that there was discrimination, or by a finding that there was not. I have no doubt that O.N.A. opposes racism and other forms of discrimination, and that in this sense it is "interested" in the result. But I do not believe O.N.A. would be adversely affected by a ruling in favour of one or more of the complainants, or, conversely, by a ruling that no discrimination had occurred. Indeed, given that O.N.A. has suggested that their interest in the integrity of the collective bargaining process requires their presence as a party, it is of some interest that they propose to argue for a determination which, they say, would require some alteration of the collective bargaining agreement.

Further, in my view, it has not been established that a remedy in this case need jeopardise the integrity of the collective agreement. S. 41 of the Ontario Human Rights Code grants very broad remedial powers to a Board of Inquiry; the very breadth of the powers mandates caution in determining parties based upon the possibility that a remedy might touch upon an interest, however tangentially.

As I understand O.N.A.'s contention, any remedy I may decide upon "almost necessarily" involves the collective agreement because any appropriate remedy would involve reinstatement of the persons involved, and that such reinstatement would involve a precise determination as to the seniority a reinstated person would be entitled to.

It appears to me that, if a remedy is finally ordered, it might well involve reinstatement. The disturbance to the collective agreement required to achieve this would not be profound. It would, however, leave the union in the same position vis-a-vis the employer as had been the case in the absence of such a remedy.

Ms. Ashman also urged me to make O.N.A. a party for the purpose of "binding" it.

Thus, she argued, O.N.A. would be able to use the fact of its being bound as an answer in any proceedings taken by disgruntled members of the bargaining unit who might allege that the union was breaching its duty of fairness to its members under S.69 of The Labour Relations Act.

I must say that I think that it is a rather remote likelihood that O.N.A. would be found guilty of "acting in a manner that is arbitrary, discriminatory, or in bad faith" under S. 69 of the Labour Relations Act if it acts in strict accordance with the ruling of a Human Rights Code Board of Inquiry. I would think it more likely that the union would open itself to this possibility if it did not act in accordance with a Board decision. But, whether that is true or not, I do not think that the union's duty of fairness to its members is affected by whether or not it is a party before me.

As I conceive of my power under s.41 of the Human Rights Code, I may make an order only against parties who have infringed a right under the Code, or against parties who have had authority to prevent discriminatory conduct, but who refused or neglected to do so. As is made clear by the French version of s.41 ("elle peut ordonner a la partie visée"), it is only with respect to an infringing party that a binding order may be made.

Thus, I do not think that I could bind O.N.A. in any event. Even if I am wrong, I am not aware of any case which suggests that a consideration such as this is an appropriate one in determining whether deciding whether to add a party.

I conclude that O.N.A. ought not to be made a party at this inquiry, and I therefore deny the motion.

AMICUS CURIAE

As noted earlier, it is my view that a Board of Inquiry does have the power to grant amicus curiae status in a proper case. Numerous Boards of Inquiry have so held, and I have been provided with no caselaw, and indeed, with no argument of principle, which would cause me to hold otherwise.

In the case before me, I propose to grant O.N.A. amicus status to allow it to call evidence and make submissions with respect to the question of an appropriate remedy. I do so particularly in view of my obligation under s. 41 of the Human Rights Code to make an order to cause a Respondent to achieve compliance with the Human Rights Code with respect to future practices. If the result of this inquiry is a finding that discrimination by one or more parties has occurred, then O.N.A.'s specialized knowledge of hospital administration and the hospital environment will be potentially very useful to the Board.

I thank counsel for their helpful arguments.

JEFFRY A. HOUSE
Board of Inquiry

